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SUPREME COURT OF UNITED STATES.

No. 139.

CHARLES H. WHEELER, *Appellant*,

vs.

RUSSELL SAGE.

BRIEF FOR APPELLANT.

MAT. H. CARPENTER,
Counsel for Appellant.

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I

Wheeler the complainant, Sage the defendant, and one Hiram Slocum were co-partners, and were joint owners of a certain mortgage given by one Alanson Sweet to one John W. Bates, upon certain real estate known as the warehouse property, in Milwaukee. The bill states that after the complainant became the owner of one-third of the mortgage, the mortgage "was treated as a partnership adventure, and was carried with the partnership accounts."

Fol. 3, page 2, record.

The answer is silent as to this allegation, but the proofs sustain the statement of the bill.

Slocum's testimony, fol. 106, p. 56 of record.

2 Letter, Sage to Wheeler & Co., p. 77 of record.

Testimony of Place, fol. 126, page 67 of record.

Accounts from page 68 to 73 of record..

The testimony shows that before Wheeler became the owner of one-third of the mortgage, Sage intended to use it to procure title to the property. The assignment itself was an agreement to convey the mortgaged property. (Page 88–104 of record.)

And the correspondence between the parties after Wheeler's purchase shows that all the parties were anxious to become owners of the property, and that they were endeavoring so to do.

Contract between Sage and Bishop & Co., page 104 of record.

3 Letter, Wheeler & Co. to Sage & Co., Oct. 11, 1853, page 105 of record.

Assignment from Sage & Slocum to Wheeler, page 88 of record.

As a means of securing title to the mortgaged premises, it was determined by the owners of the mortgage, pending proceedings to fore

close it, to purchase judgements against said Sweet, who was then insolvent, and the judgments could be purchased at great discount.

The bill states, fol. 4–5, page 3. "That after the commencement of said foreclosure proceedings, and before the sale hereinafter mentioned, the said Russell Sage, in substance, informed the said Hiram Slocum and your orator that, for the sum of ten thousand dollars he could procure Alexander Mitchell, of Milwaukee aforesaid, to purchase in the said judgments resting upon said mortgaged premises, and to se-
4 cure to these plaintiffs thereby, and with their said mortgage and deed, a perfect title to said mortgaged premises; that thereupon it was agreed so to do, and the said Sage was authorized by your orator and the said Slocum to effect that arrangement, and was to charge to your orator on the said firm books his share of the ten thousand dollars, there then being more than that amount standing to the credit of your orator thereupon; and a like amount was to be charged to the said Slocum, he then also having, as your orator believes, credit upon the firm books to more than the amount so to be charged to his account."

The answer says, (fol. 15, page 8 of record,) the defendant may have expressed the opinion that for $10,000 he could purchase judgments to secure title, but "expressly avers that no agreement to such effect in substance, or any agreement in fact whatever, was made with Mitchell prior to said decree"—in the foreclosure suit.

5 The proofs sustain the averments of the bill, and are quite sufficient to overcome the answer.

1. By the advice and consent of Slocum and Wheeler, Sage and Mitchell had an interview in the city of New York upon this subject.

Letter Wheeler & Co. to Sage, May 15, 1855, page 116 record.
" Wheeler & Co. to Sage, May 18, 1855, page 116, 117 record.
" Sage to Wheeler & Co., dated May 17, 1855, page 97 record.
" Sage to Wheeler, dated May 19, 1855, page 56 record.
Testimony of Slocum, fol. 106, 107, page 56 record.

6

Immediately after this interview, both Sage and Mitchell wrote letters stating what was done. Sage's letter to Wheeler May 21, 1855 p. 66 record, says: "I have concluded an agreement with Mr. Mitchell in relation to our foreclosure, *on the terms you proposed to him*, to-wit: We to pay him $10,000 on perfecting our title, which is to be done by letting the suit go over until his return, in August, when he will so arrange matters with other parties that we can get our decree and perfect sale."

Mitchell the same day wrote his attorney, Mr. Emmons, to the same effect, p. 66 record: "Mr. Sage came here to day to see me in regard "to the Sweet judgments. Mr. Sweet had so far divulged matters that I "had fully to define my position, as Mr. Sage did also his. There was
"no use in he and I coming into competition with each other, *and*
7 "*an understanding has now been come to* by Mr. Sage and my-
"self, (the particulars of which I will inform you on my return)
"that must be satisfactory to all concerned."

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These letters conclusively establish that the agreement was entered into between Sage and Mitchell as charged in the bill. The two letters are equivalent to a written contract signed by both parties, or to contract in duplicate, each signed by only one party; and therefore, and as a part of the *res gestae*, the letter of Mitchell, though he is not a party to the suit, is competent evidence.

To show that Sage understood this matter as charged in the bill, see

Letter Sage to Wheeler, May 23, 1855, p. 98 record.

8 " Sage to Wheeler, May 23, 1855, p. 75 record.

" Sage to Wheeler, June 6, 1855, p. 76 record.

The proofs do not show how many judgments were purchased under this arrangement. This was left to be shown on the accounting; but the correspondence between the parties shows that the purchase of judgments continued till after the arrangement was made for a decree in the foreclosure case. Letter Sage to Wheeler May 25, 1855, (page 18 record.) Wheeler & Co. wrote Sage Sept. 5, 1855, (page 118, record.) "Emmons says that some party has purchased some judgments vs.

9 Sweet, in Boston, paying almost full price." Sage replies Sept. 8, 1855, (p. 100, record:) "I am sorry to hear of the purchase of debts against Sweet, but we must do the best we can."

The basis for decree in the foreclosure case was agreed upon Oct. 10, 1855, see letter Sage to Mitchell, (record page 102.) The same day Sage wrote to his solicitors Finch & Lynde, informing them that he had accepted Mitchell's proposition for basis of decree, and urging them to go on buying up judgments, (record page 101.)

Sage writes to Wheeler Oct. 22, 1855, (page 102 record:) "Mitchell "writes me that he thinks Finch indifferent about aiding in getting up "'a few judgments owned by his clients, and infers he feel sore because "the whole matter was not entrusted to him, but advises that I

10 "treat him kindly and courteously. You know well enough that "he never could have got through, but for the arrangement we 'have made, even if we do with it.

The letter of Mitchell referred to by Sage, is dated Oct. 17, 1855, p. 89, record.

As late therefore as the 22 October 1855, it is evident the parties were attempting to carry out the arrangement made in New York between Sage and Mitchell.

11 By the contract between Sage and Mitchell, dated February 20, 1856, [page 22 record,] it appears that Mitchell purchased after the arrangement between him and Sage, and previous to that time, Oct. 22, 1855, when Sage's letter shows he and Mitchell were endeavoring to carry out the agreement—the following judgments:

June 12, 1855, A. Edwards' & Co. judgment,

July 20, 1855, Vechte & Berg judgment,

" " " Loring & Field judgment.

and that he had also purchased other judgments before the arrangement made with Sage May 21.

About thirty days after the letter of Sage last cited, Sage went
12 to Wisconsin, and entered into a fraudulent scheme to secure privately to himself the very interest he had been laboring, as agent of his co-partners, to secure for joint benefit.

The deposition of Alanson Sweet, relating an interview between him and Sage about 20 Nov. 1855, explains why Sage departed from this arrangement with Mitchell: "he thought some other course could be taken that would answer Sweet's purpose *and be better for him*"—*Sage.* [page 32, record.] The sequel developes *the other course* that was to be as well for Sweet and better for Sage.

The bill states [page 4, record,] that the agreement between Sage and Mitchell, by which Sage was to retain an interest in the property was made verbally before the sale of the mortgage premises. This the answer denies, fol. 18, page 10, record, and again evasively in fol.
13 19, page eleven of record.

The deposition of Sweet being conclusive upon this important point, the defendant has assailed and attempted to contradict it by reading the sworn answer of Sweet in another case. It is manifest from the whole case that Sweet was insolvent and was endeavoring to save something from the wreck of his fortune; and it may be admitted—for the purposes of this argument—from his creditors also. It is immaterial to us whether the answer of Sweet was made in ignorance of the legal effect of the arrangement between him and Sage or whether it was untrue Even the testimony of an accomplice in crime is taken by the Court weighed by the jury and if believed and if corroborated in many particulars by other testimony, may sustain a conviction.

14 1. Sage was in Milwaukee about the time testified to by Sweet.
Letter, Sage to Wheeler, Oct. 29, 1855, page 103 of record.
Accounts, page 73 of record, entry Nov. 20, 1855, Sages's expenses to Milwaukee and back, $25.

2. It is certain that as late as Oct. 22, 1855, Sage was trying to carry out the arrangement with Mitchell to purchase the judgments. Why was this plan abandoned? Nothing in the case except the facts as stated by Sweet, can explain this.

3. The testimony of Mitchell corroborates Sweet. Mitchell at first testified, (answer to 13th cross interrogatory, page 85 of record) that the arrangement between Sage and himself, by which Sage was to retain an interest in the property was made when he was in Milwaukee at the time of the sale of the mortgaged premises. This contradicted
15 Sweet in an important particular, by fixing the date of the arrangement some months later than Sweet had testified it was. But Mitchell, after the adjournment from 1st of July to 3d of August, ascertained that he was mistaken, and corrected his statement, (page 86 of record,) and said: "*I am now satisfied that the matter must have been talked over and understood when Mr. Sage was here in November.*" Thus directly corroborating the testimony of Sweet.

4. The contracts reduced to writing after the sale, [pages 20, 21, 22, of record] and which Mitchell swears were verbally agreed to in November, substantially conform to the arrangement as Sweet testifies to it.

5. The letters of all the parties show that Sweet made resistance to the decree in the foreclosure case until after the arrangement in May, between Sage and Mitchell, Sweet's friend. If the arrangement had been understood to be abandoned, Sweet would have renewed his opposition to the decree. The conclusion is irresistable that Sweet
16 was satisfied with the arrangement which he swears was then made in place of that of May before, and which was "*just as good for Sweet, and better for Sage.*"

This arrangement, in November, 1855, Sage carefully concealed from his partners. Sweet testifies [page 33 of record] that Sage requested him not to mention the arrangement to Wheeler; "he remarked that it would be bad policy to say anything about this arrangement to anybody, not even to Wheeler, *as it might possibly affect the title.*" It would have affected the title which was to be placed in Mitchell for the benefit of Sage only, for the other partners would have claimed their right to participate in the arrangement.

The learned counsel endeavored to extract some proof from Mitchell, that this arrangement was communicated to Wheeler. Question 11th, page 82 of record, was made to embrace this and another arrange-
17 ment to which Mitchell denied that Sweet was a party. Then question 12th, "Do you know whether Mr. Wheeler was informed of the fact, or the substance, of the agreement between you and "Mr. Sage prior to the decree?" Two such agreements having been spoken of in the preceding question.

The witness answered: "I have no positive personal recollection, although I do not well see how it could have been otherwise. There was certainly no secret in the matter, and I was as free to talk with Mr. Wheeler as Mr. Sage." But the witness immediately added: "This answer *refers exclusively* to the agreement as to the basis for fixing the amount due under the mortgage." Considering that Mitchell is friendly to Sage—that they have had extensive monied transactions
18 together—"the most intimate business and social relations existing between them" [See answer of Sage, fol. 20, page 11,] this answer is equivalent to saying that the arrangement as to Sage's retaining an interest in the property after the sale, *was kept secret from Wheeler.*

Slocum testifies: [page 57 of record] that on being informed by Sweet, some two years after the sale, that Sage had retained an interest in the property, he called on Sage and told him that Sweet so informed him; Sage denied it, and charged Mr. Sweet with falshood in representing so.

The letters of Wheeler to Sage, after the 20th November, show he was ignorant of the change of plan by Sage.

Letter, Wheeler to Sage, Jan. 19, 1856, p. 120 of record.
Letter, Wheeler to Sage, Jan. 26, 1856, p. 121 of record.
Letter, Wheeler to Sage, Jan. 30, 1856, p. 121 of record.

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The defendant, to show that Wheeler knew at the time of the sale, that

the arrangement made between Sage & Mitchell in May, was not to be carried out; attempts to prove by Mitchell and Mr. Lyndsay Ward, that Wheeler at about the time of the sale was attempting to purchase the property for his own benefit. Here the testimony turns upon a date.—And we submit that the testimony shows that Mitchell and Ward are mistaken as to the time of the conversation. This is not a greater mistake than Mitchell made and corrected, as to whether the contract between himself and Sage was made at the time of the decree, or
20 at the time of the sale. But it is wholly immaterial whether or not Wheeler knew at the sale or before, that the arrangement of May 21st was not to be carried out. To affect our case, *it must be shown that Wheeler was informed of the new arrangement*, which neither Mitchell nor Ward prove.

21

II.

The decree agreed upon in the foreclosure suit was entered and the sale took place in February, 1856, after which Sage and Mitchell reduced to writing the agreement entered into in parol, between them, before the decree as testified to by Sweet. By this fraudulent conduct, Sage, who in all this matter had acted for all the parties, and as their agent to procure the title to the property, made substantially the same arrangement for himself personally, that he had been laboring to make for his partners also, and concealing the fact from them, induced them to accept what would have been their proportion of the money secured by the mortgage, if such arrangement had not been made.

22 Wheeler, learning the fact that Sage retained an interest in the property, by said secret contracts with Mitchell, brings this bill against Sage to be admitted to participate in the same, to the extent of his interest. This is resisted by the defendant mainly upon the following grounds:

FIRST.

That in his bill the complainant did not offer to pay back the sum which Sage paid him at the time of the sale, as his proportion of the money secured by the mortgage.

23 1. This is a technical objection to the frame of the bill which could only be taken advantage of by a demurrer.

Story Eq. Pl. Sec. 453, 528.

2. The bill states (fol. 8, page 5 of record,) that Sage has received under said contract with Mitchell much more than the amount paid by him to Wheeler, and it is for his proportion of that surplus that Wheeler brings this suit.

SECOND.

The defendant also claims, or did in the Court below, that the case shows an attempt to cheat and defraud the creditors of Sweet, and that Wheeler and Sage were both implicated in this fraudulent attempt, and therefore Wheeler cannot call Sage to account for his administra-
24 tion of this unlawful scheme.

1. The rule of law is well settled, that where a bill seeks to enforce a contract which rests in illegality, or which was entered into to defraud others, the Court will not hear the parties, *and thus give effect to an illegal agreement.* Such was the case, Randall vs. Howard, 2 Black 585. The Court say, "The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, *and the object of the bill is to compel him to do it.*" In such a case it is conceded the suit cannot be maintained.

But when a defendant is called to an accounting in a court of equity *for breach of trust*, he is never permitted to set up *that the fund was* CREATED IN SOME ILLEGAL WAY.

25 *In Barney vs. Sanders*, 16 *How.* 543, this Court compelled a trustee to account for usurious interest, illegally taken by him on the trust fund.

See also *McBlair vs. Gibbs*, 17 *How.* 232.

This is not a case where Mr. Sage can make infamy his shield, and by setting up his defence he sacrifices his character without any equivalent.

2. There was nothing illegal in the arrangement made by these mortgagees to purchase in the other incumbrances on the property. These judgments were only available in the order of their priority, and to that extent they were entitled to be protected, without regard to who owned them. The transaction was at most, at the worst, but a speculation in the indebtedness of another, the legality of which a Prince from
26 Wall Street is estopped to question.

3. The agreement as to the purchase of judgments, even if illegal, which is not admitted—is fully performed. This Court is not called upon in this bill to enforce it, but the defendant, a partner with the complainant, is called on to account for gains that have come to his hands by a partnership adventure; and the case is fully within McBlair vs. Gibbs.

27 THIRD.

It is also claimed that this bill cannot be sustained because it would be to create a trust in real estate by parol.

1. The statute relates exclusively to trusts growing out of contract; cases where the complainants right to the relation of *cestui que trust*, depends upon *a parol agreement to that effect.* Such was the case Randall vs. Howard, 2 Black. 585. In that case a defendant in a foreclosure suit had consented to a decree and sale of the premises, in consi-

deration of the plaintiff's parol agreement to bid in the premises and hold them in some decree for the defendant's benefit; and after the sale the defendant exhibited his bill to compel the execution of this trust created by the parol agreement only. The parties were litigants, holding towards each other no confidential relations, dealing as some
28 of the cases express it, "at arms length."

But whenever a party obtains land by fraud, he is regarded in law as the trustee of the person defrauded, and compelled to account. Parol proof is sufficient to establish the fraud, and then the law forces upon the guilty purchaser the relation of trustee, and make him answerable accordingly. In such case the trust is not created by an *agreement to that effect*, but by operation of law; and the statute of frauds does not apply.

29

The case at bar belongs to the second class of cases. Sage and Wheeler were co-partners; and in this matter Sage had been acting as agent for all the mortgagees, to obtain title to the mortgage premises. He had had the general charge of the litigation to foreclose the mortgage; he made the arrangement with Mitchell in May, for the benefit of all the mortgagees; and by the contracts between himself and Mitchell at the time of the sale, Sage put his partners—co-owners aside; and made with Mitchell, but for his own benefit, substantially the same agreement he had before negotiated for the benefit of the mortgagees. This was a fraud upon them, and they have a right to compel Sage to answer as trustee for their proportions of benefit secured by Sage, through this arrangement made in fraud of their rights.

30 *Fawcet vs. Whitehouse*, 1 *Russ. & Mylne* 132. This case was fully considered on appeal by the Chancellor, and is directly in point.

Flagg vs. Mann, 2 *Sumner* 486,–520, was considered at great length by Judge Story, and fully sustains the above position. The facts of the case are very similar to those of this case. Flagg and Mann agreed *in parol* to purchase for their joint benefit a certain estate, and for that purpose agreed [1], to purchase the title of one Richardson, the owner of the equity of redemption; (2), to extinguish a claim thereto by the heirs of Frye; (3), to pay Walker and Fisher the sum due them as incumbrancers. In pursuance of this parol agreement they obtained a conveyance from Richardson. Flagg then procured the title of the heirs of Frye to be conveyed to him alone, and also procured to himself a deed from Walker and Fisher. The bill charged that these latter conveyances to Mann ought to have been taken to Flagg and Mann in pursuance
31 of the agreement. The Court held that the conveyance of the equity of redemption from Richardson created a privity of estate in the premises between Flagg and Mann; that the subsequent conveyances to Mann were a fraud upon Flagg; and he was decreed to hold the title thus acquired for the joint benefit of Flagg and himself, and compelled to account. In this case Sage and Slocum owned a mortgage on the premises, and Sweet, the owner of the equity of redemption, had conveyed

the premises to them by quit-claim deed, after which they assign one third interest *in the estate* and mortgage to Wheeler. This created precisely the same privity of estate or interest between Sage and Wheeler that was created by the conveyance from Richardson to Flagg and Mann; and upon the principle of that case, Sage could not, by the agreements with Mitchell, clandestinely acquire to himself any interest in the premises to the exclusion of those in privety with him.

See also *Giddings vs. Eastman*, 5. *Paige* 561.

32 *Parkist vs. Alexander*, 1. *John. ch.* 394.
Lees vs. Nuttall, 1 *Russ. & Mylne*, 53.
S. C. affirmed, 2 *Mylne & Keen* 819.
Reed vs. Warner, 5 *Paige* 650.
Gardner vs. Ogden et. al. 22. *N. Y.* 327.

2. The assignment from Sage & Slocum to Wheeler, (page 88 of record) refers and is subject to the contract between Sage & Bishop & Co., (page 104 of record) and both must be construed together.

33 The latter agreement, made in Sept., 1853, was for a conveyance of a part of the mortgaged premises, "as soon as said Sage could perfect the title by foreclosure," showing that the parties interested were calculating upon procuring the premises. The assignment from Sage & Slocum to Wheeler, (page 88 of record,) was made as it shows after the conveyance to them of the equity of redemption by Sweet, and in this assignment, Sage & Slocum agree "to account to Wheeler *or convey to him one undivided third of their interest in the property conveyed by Alanson Sweet to Sage & Slocum* on the 12th day of September, 1851, by quit claim deed; and one undivided third interest in a certain mortgage executed by said Alansod Sweet," &c.

This agreement, *which is in writing*, shows that one-third of the mortgaged premises was to be conveyed to Wheeler as soon as title could be perfected by foreclosure; the letter from Sage to Wheeler, May 21

34 1855, (page 74 record) and the letter of same date from Mitchell to Emmons, (p. 66 record,) showing the arrangement at that time with Mitchell for perfecting the title by aid of the judgments; together with the written contracts between Sage & Mitchell, after the sale (pages 20, 21 and 22,) make out all the facts necessary to sustain this bill, without the aid of a word of parol proof; and *for this reason also*, the case is not within the Statute of frauds.

Indeed our case is in no sense within the Statute. We do not seek to enforce an agreement made in parol by Sage to give us an interest in his arrangement with Mitchell. It is not pretended he ever agreed to. But we show a state of facts, which in law makes the contract made between Sage & Mitchell inure to our benefit; the law declaring Sage a trustee as to the interest he thus acquired clandestinely and in fraud of our rights.

35

III.

There is another distinct ground upon which this bill may be sustained. Sage had the management of the foreclosure suit against Sweet; by which suit the owners of the mortgage, including the complainant, were endeavoring to procure title to the property. The property was sold at the sale to Mitchell, and Sage says in his answer that "after such sale "the said Mitchell informed this defendant that it was at that time in- "convenient for him to raise the said amount of twenty-four thousand "dollars, or thereabouts, the amount which had been agreed upon as "hereinbefore stated, and he proposed in substance to this defendant, "*that in lieu of the money* he should take an interest in said mortgaged "premises," &c.

36 Upon this theory of the case, (and whatever others may think, Sage cannot complain *if this Court should* believe his *sworn answer*) Sage who was acting for Wheeler & Slocum as well as himself, received *in lieu of the twenty-four thousand dollars to be paid to them*, a certain interest in the mortgaged premises. Then, that interest belonged to Sage, Slocum & Wheeler, jointly. Since, Sage as agent for the firm had accepted it as payment *instead of the mony*; and within the principle of the cases before cited, and all the cases upon the subject, Sage could not compel his co-partners to take money from him, in lieu of the real estate he had taken in payment from their debtor.

MAT H. CARPENTER,

Counsel for Appellant.

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Supreme Court of the United States.

DECEMBER TERM, 1863.

CHARLES H. WHEELER, APPELLANT,

vs.

RUSSELL SAGE.

BRIEF AND POINTS FOR RESPONDENT.

It will be very difficult to find out either from the bill of complainant or complainant's proofs, or from both combined, what is the real theory of law or fact upon which he proceeds and supposes himself entitled to recover. Numerous propositions were advanced by counsel in the court below; and we can do little more here, in undertaking to submit points in advance, than to meet and combat those propositions. In doing so, we think we can dispose of his case, whatever theory may be broached in this Court, or whatever new propositions may be put forth.

The facts are few and simple. In September, 1851, the complainant and defendant and one Slocum formed a copartnership, to continue for three years, for the purpose, as alleged in the bill, of carrying on the general produce and commission business, *at the city of Troy*, N. Y.; but it would seem from the proofs that they had two places of business; one in Troy, where the firm was known as R. Sage & Co., and one in Milwaukee, where the firm was hailed as Wheeler & Co. It appears that

in September, 1849, one Alanson Sweet and wife executed to the defendant Sage and one Bates, jointly, a mortgage of certain real estate in Milwaukee, including what is termed and known in the pleadings and proofs as the warehouse property, to secure an indebtedness of sixteen thousand dollars. Sometime in 1853, and during the existence of the copartnership, this mortgage debt became, through several mesne assignments, the property of the copartners—perhaps of the firms. It is alleged in the bill, and Slocum so swears, that it was treated as a partnership asset. We shall, for all purposes of this argument, be willing to concede, that the mortgage debt was partnership property. It appears by the allegation of the complainant in his bill, (print, p. 1,) and by the deposition of Slocum, (print, p. 56,) that the copartnership was dissolved by limitation in September, 1854. Shortly after this, Oct. 22, 1854, proceedings were instituted to foreclose the mortgage in the State Court of Wisconsin, and wherein final decree was rendered on the 16th day of November, 1855. To these proceedings Sweet, as well as numbers of his judgment creditors, appeared and made defence and filed cross bills; but it would seem that these defences were on behalf of Alexander Mitchell, and controlled principally by him. (See his dep., p. 19, cross-examination. Letter of Sage to Wheeler, 21st May, 1855, p. 74; and letters of Mitchell to Sage, p. 89.)

The parties Wheeler, Sage, and Slocum, were anxious to secure to themselves the legal title of the warehouse property; they sought to accomplish this through the instrumentality of their mortgage, and by purchasing the control of subsequent judgments against Sweet, the mortgagor, and considerable correspondence and negotiation was had on the subject; but the scheme was, before the sale of the mortgaged premises, abandoned, as we shall have occasion to show hereafter.

As between Mitchell and Sage, it was agreed that defences to the foreclosure proceeding should be withdrawn, and that a decree should be entered for the nominal amount, appearing to be due upon the mortgage for principal and interest, and the expenses incurred for taxes and repair of the warehouse property; this, however, was to be reduced by a deduction of the amount of a charge to the mortgagees for the occupation of

the warehouse, at the rate of $2,000 *per annum*, and the decree was to be satisfied upon payment of the sum remaining due after such deduction. (See letters of Mitchell to Sage, p. 89, and Mitchell's deps., pp. 16 *et seq.*, 80 *et seq.*)

A sale of the mortgaged premises took place in February, 1856, when they were bidden in by Mitchell for the aggregate sum of $19,000.

After the sale, Mitchell and Sage entered into the agreements appearing on pages 20, 21, and 22 of the printed record. The bill alleges (page 4), upon information and belief, that this agreement was made before the sale. This allegation is denied by the answer. (P. 10.) In this, it is true, there is some contradiction—Mitchell testifying that he thinks, from the nature of the transaction, that there must have been a parol understanding prior to the sale. If we are correct, however, in either of our propositions submitted in defence, the fact becomes entirely immaterial.

There are two alleged grounds of recovery faintly shadowed forth in the bill, and will probably be assumed in this Court.

1st. That the motgage *debt* being partnership property, Sage could not deal with or become interested in the mortgaged *premises*, except as an agent and trustee of the firm.

2d. That there was an agreement between the parties that Sage should act as the agent of the parties in negotiations with Mitchell, to "secure a perfect title to the mortgaged premises" (print, p. 3), and that such agreement is evidenced by the letters passing between them, and which serve to take the case out of Statute of Frauds.

See Rev. St. Wis., 1849, Chap. 75, Sec. 6, p. 388.

Anticipating a renewal of the above points in argument here, we answer to the first ground:

I. There exists as between copartners, and arises from their relations as such, no other species of agency or trust, than such as springs directly from and relates especially to their partnership business. They are the mutual agents of one another

only with regard to things which respect the partnership business. To this we need but cite elementary authority.

Story on Agency, secs. 37, 39.
Ibid, 124, 125.
Story on Part., sec. 1.
Ibid, secs. 110, 113, 154, 243.
Ibid, 169, 174.

It is not pretended anywhere that the purchase of this real estate was any part of the legitimate business of the partnership, or one of the objects for which it was created.

See the Articles of Copartnership, print, pp. 86 to 88.

The bill of complaint itself states in the outset that they were partners "conducting a general produce business." It does indeed afterwards allege, that after Wheeler became interested in the mortgage debt (p. 2), "the same was treated as a partnership adventure, and was carried to the partnership accounts." Suppose this to be true, what then? They gained thereby no interest in the mortgaged *premises*. The complainant seems to suppose that with the ownership of the *debt* the firm acquired a vested interest in the real estate by which it was secured, and a right to "secure a perfect title;" but surely, not so. When Sage had collected the debt and accounted for it, there all agency ceased. He might, during the existence of the copartnership, have acquired in his own right the equity of redemption, without violating any legal duty or trust springing from his relation as a copartner. His contract, therefore, with Mitchell for an interest in the premises—whether before or after the foreclosure sale—was no breach of his obligation as a partner. We submit that he could in his own right have become a purchaser at the sale, paying down, of course, the mortgage moneys.

Dunlap's Paley on Agency, 163, and note (3.)

If he could, then he might bargain with Mitchell even without any new consideration, or other one than the mortgage debt, so long as he fully accounted to his copartners for their share of the debt secured.

In treating of this branch of the case, we of course consider it as entirely independent of any alleged *agreement* or *contract* on Sage's part to secure title to the mortgaged premises. That assumption on the part of the complainant will be noticed hereafter. At present we speak only of Sage's legal relations as a partner, with reference to the mortgage debt.

The authorities which we have cited, show that it is only as to the strictly legitimate objects and purposes of the copartnership that a partner acts for and can bind the firm. Beyond those he acts for himself, and is not presumed to be acting for the firm. If Sage had used the funds or capital of the firm for his own profit, he might be compelled to account; that is not, however, this case—far from it.

The mortgage was in process of foreclosure in Sage's name, and was vigorously defended. Sage treated with Mitchell, on whose behalf the defences were urged; and with the full knowledge and assent of complainant, the amount of the mortgage debt, or basis for its ascertainment, was established by compromise.

> See Mitchell's dep., p. 81, 5th interrogatory, and 83, 12th interrogatory.
>
> Accounts stated, on settlement between Wheeler, Slocum & Sage, pp. 68–71.
>
> Wheeler's letters to Sage, Oct. 9th, 13th, 17th, 27th, 29th, and Nov. 8th, 1855, pp. 119, 120, 121.
>
> Sage to Wheeler, Oct. 4th, 10th, 1855, p. 101.
>
> Mitchell to Sage, 6th Oct., 1855, p. 89.

When Sage had effected this he had done all which his duty as a copartner required of him. They had a decree for all they could claim upon their mortgage. Mitchell stood ready, and bound for his own protection, as subsequent incumbrancer to a large amount, to bid in the mortgaged premises, when he bargained with Sage to save himself the necessity of raising the money immediately to discharge the decree. This contract was one to which the other partners could not have been admitted as parties, and it interfered with no possible right or equity of the complainant.

II. Admit that the mortgage debt was a partnership asset:

that Sage, in its collection, could not absolve himself from or put off his relations as a partner; and we may further admit for the sake of the argument, that if Sage himself had become the purchaser, he would have held the premises in trust for his co-partners to the extent of their relative interests. He did *not* become the purchaser. True, the purchase by Mitchell was in part for Sage's benefit; but not without new and independent considerations, proceeding from Sage alone. The declaration of trust by Mitchell, and the agreement between him and Sage as to judgments (print, pp. 20, 21, 22), will of course be taken and construed together as one instrument. They are made at the same time, between the same parties, and refer to the same subject-matter.

By this agreement, Sage indefinitely postpones the receipt of the mortgage debt, which otherwise, as Mr. Mitchell tells us in his testimony, would have been paid in cash at the sale; (print. p. 81, answer to fourth interrogatory,) he assumed with Mitchell the burden of purchasing further judgments against Sweet, as well as the ownership of those already purchased, and took upon himself the risk of the prospective value of the property. He did not speculate out of the copartnership funds, but accounted fully to his former partners for the whole mortgage debt. If he had done less there might have been room for an action for the deficiency.

III. It will hardly be pretended that Sage could even during the existence of the copartnership, have bound his copartners by the contract he made with Mitchell. It was one beyond and entirely foreign to the concerns of the partnership; a contract which he could only make and bind himself to as an individual; one to which the other partners could neither become parties or adopt at their own option. Hence they can take no advantage from it. If it be said that it was Sage's duty to have contracted for their benefit, we answer again that he did, to the full and equitable extent of his legal duty and obligations, by securing the whole mortgage debt. The radical error and mistake of the complainant is, in supposing himself, and by mere reason of his ownership of the mortgage debt, entitled to something more than his principal and interest.

Sage may have speculated with his portion of the proceeds of sale by the negotiations made with Mitchell. Had he not the same right to do this as to have invested in any other species of property? It will be remembered that there is no complaint made of the amount agreed on as the basis for the decree. This agreement was made months before, and was entirely independent of the contract between Mitchell and Sage. (See Mitchell's deposition, p. 81, 5th interrogatory.) Wheeler knew of this agreement and was satisfied. (Mitchell's deposition, p. 83, 12th interrogatory. Account stated on settlement between Wheeler, Slocum, and Sage, p. 70. Wheeler's letters to Sage, Oct. 9, 13, 15, 27, 29, and Nov. 8, 1855, pp. 119, 120, 121. Sage's letter to Wheeler, Oct. 10, 1855, p. 101.) The bill alleges no wrong in this compromise. Now, suppose Sage had simply left the mortgage moneys upon interest with Mitchell; could there, in such case, have been any allegation of wrong? If not, why is he to be prohibited from investing his money in the mortgage premises? No part of the consideration furnished by Sage belonged to Wheeler, or to the firm of Wheeler & Co. He used neither the cash, credit, or influence of the complainant.

IV. At the time of the agreement between Mitchell and Sage, and by which Sage was to become interested in one-third of the mortgaged premises, the copartnership of Wheeler & Co. was at an end, dissolved by limitation.

See bill, complaint, p. 1. Slocum's dep., pp. 55, 56. Articles of copartnership, pp. 86, 87, 88.

All the peculiar duties and obligations of trust and agency flowing from the relations of the copartners had therefore ceased to exist. Sage was left free to deal as a mere joint owner of the mortgage debt.

Story on Partnership, sec. 322, 323.
Bell *vs.* Morrison, 1 Peters, 351.
Featherstonhaugh *vs.* Fenwick, 17 Ves., 311.

In the latter case where the question arose whether one partner could take a lease to himself of premises used by the

firm for partnership purposes, Lord Elden says that, had the partnership been dissolved, the defendant might have treated for the lease to himself.

We think we may safely conclude that there is nothing growing out of the partnership itself, or Sage's relations thereto, which will hold him as having acted in the capacity of agent or trustee.

V. The alleged agreement on the part of Sage to perfect title to the mortgaged premises.

This pretended agreement is loosely set forth in the bill as follows:

"And your orator further shows, upon information and belief, that, subsequent to said mortgage, and prior to the commencement of said foreclosure proceedings, a large amount of judgment, being liens upon said mortgaged premises, had been obtained in the courts in the State of Wisconsin, against the said Alanson Sweet, severally or with others; and your orator, together with the said Sage and the said Slocum, deemed it desirable to obtain the control of said judgments; that the said Alanson Sweet had then become insolvent; that, after the commencement of said foreclosure proceeding, and before the sale hereinafter mentioned, the said Russel Sage, in substance, informed the said Hiram Slocum and your orator that, for the sum of ten thousand dollars, he could procure Alexander Mitchell, of Milwaukee aforesaid, to purchase in the said judgments resting upon said mortgaged premises, and to secure to these plaintiffs thereby, and with their said mortgage and deed, a perfect title to said mortgaged premises; *that thereupon it was agreed so to do*, and the said Sage was authorized by your orator and the said Slocum to effect that arrangement, and was to charge to your orator on the said firm books his share of the ten thousand dollars, there then being more than that amount standing to the credit of your orator thereupon; and a like amount was to be charged to the said Slocum, he then also having, as your orator believes, credit upon the firm books to more than the amount so to be charged to his account." (Page 3.)

There is no pretence that what was thereupon agreed to be done was reduced to writing; but to prove the existence of a mere parol agreement the complainant gave in evidence, under objections, several letters of Sage, pp. 73 to 78; letter of Mitchell to Emmons, p, 66; deposition of Reed, pp. 49 to 55; deposition

of Sweet, pp. 30 to 49. The objections insisted on will be found on pp. 131 to 133.

1. The letter of Mitchell to Emmons was clearly inadmissible. Mr. Mitchell is not a party to the suit; he has no interest in or privity with the complainant or defendant, or otherwise, in the subject matter litigated. What he said, although not material to the real merits in controversy, was the simple declaration of a stranger to the record to another stranger. We submit with entire confidence that the letter will be rejected as incompetent evidence.

2. Reed's deposition should be wholly suppressed. He attempted to testify to the parol declarations of Sage. They were inadmissible, being in the teeth of the Statute of Frauds, cited *ante*, Rev. St. Wis. Ch., 75, sec. 6. His testimony corresponded with no allegation in the bill. They make Reed swear (Record pp. 50, 51), that Sage said in November, 1852, "he expected he should have to foreclose the mortgage; if so, he should bid it in (the warehouse) for the benefit of Wheeler & Co.," when the fact is, that Wheeler did not become interested in the mortgage debt until September, 1853—

(See Allegation in Bill, Record, p. 2.
Assignment to Wheeler, " " 88.)

—and when the complainant does not pretend that he had any agreement with Sage for "perfecting title," or contemplated the thing until "*after* the commencement of the foreclosure proceeding," which was in October, 1854.

Printed Record, p. 3.

But Reed's refusal to produce the memoranda from which he testified, and his refusal to answer defendant's cross-interrogatories, must exclude his deposition independent of any other question.

See Cross-examination of Reed, pp. 52 to 55.

We had an undoubted right to see his written memoranda, and he was contumacious in refusing to produce them, and in declining to answer our interrogatories. It is no answer to say

that we had a remedy by appeal to the Court, and commitment of the witness until he answered. He was complainant's witness, and it devolved upon the complainant to purge his witness of contumacy before his deposition could be read.

3. As to the deposition of Alanson Sweet, we are at a loss to discover for what it was introduced, save that it might have been possibly to prove that Sage did have some understanding or agreement with Mitchell for an interest in the mortgaged premises prior to the foreclosure sale.

What Sweet swears to is positively and responsively denied by the answer.

Record, pp. 8, 9, fols. 15, 16.

Sweet is also emphatically contradicted by Mr. Mitchell.

Mitchell's Dep., p. 82, Interrogatories and Answers, 6th to 11th.

Sweet's statements are bald falsehoods. He would make it appear that he was being treated with by Mitchell and Sage for the basis of a decree, and for future interests in the mortgaged premises, when he had no title to or interest in them whatever, as appears by his own solemn avowal, under oath, but a short period previously.

See Sweet's answer to the bill of Danforth and others (Record, p. 125, *et seq.*), and particularly last paragraph, on p. 128 to 129, where it appears that Sweet's interest in this very property had been sold on Blossom's execution. And, in the same connection, see also list of judgments against Sweet.

Record, p. 122.

Sweet's deposition should be disregarded as unworthy of belief, and rejected as wholly immaterial and irrelevant to the issues made.

VI. There is no evidence upon the record proving the existence of any contract on Sage's part to "perfect title" to the mortgaged premises.

1. It was sought, by the introduction of a series of depositions and long correspondence between the parties, to establish such contract or agreement, and to fix upon the respondent Sage a liability beyond that which would exist and flow from his mere connection as a copartner.

The Court below found and decreed against the existence of any such compact. It was a mere question of fact as to whether it did or did not exist. That fact was to be ascertained by weighing a very complicated mass of testimony, and which, the pleadings considered, was in a measure contradictory. The District Court passed upon the fact; and it will be conceded that if the fact were rightly found, no error of law was committed in dismissing the bill.

This Court will not review the finding of the District Court upon this question of fact. In such a case they will assume the *fact* to be as found below; and if the law has not been misapplied to the fact found, the decree must stand. This principle we understand to have been repeatedly asserted by this Court.

2. But if the Court will proceed to inquire into the fact, and ascertain from the evidence whether such contract was ever fully consummated by the parties, then we say the weight of evidence is decidedly against the complainant.

The letters of Sage, before referred to, and which were all the complainant offered on the subject, prove what the defendant Sage, in substance, says in his answer, that although they at one time contemplated securing title to the warehouse property, and that negotiation with Mitchell and correspondence ensued, yet that the scheme was never consummated, became impracticable, and was abandoned. The subsequent letters of the parties, referred to hereafter, show this more abundantly; those already cited show that much depended on their own future action, and what could be accomplished with "Bishop & Co.," and "Blossom."

See the letter May 21st, 1855, p. 74.

In this letter, it is true, Sage says he has "concluded an agreement with Mitchell;" but it was, after all, the expression of an opinion merely. The subsequent correspondence and negotiations with Mitchell show conclusively that no agreement had been concluded. If Mitchell's letter of the same date (p. 66), and to which we have objected as incompetent, be admitted, it affords no evidence that any such bargain as is alleged was concluded.

See Mitchell's Dep., p. 83, 15th Interrogatory.
Mitchell's Letter to Sage, 6th Oct., p. 89.
Sage to Wheeler, Oct. 10th, p. 101.

No agreement of any kind was concluded with Mitchell until the month of October, 1855; and that agreement was simply as to the basis of adjusting the amount due upon the mortgage.

Take all the testimony bearing on the subject, and it affords no evidence upon which the Court can proceed to a decree. The bill alleges that Sage informed Wheeler & Slocum that for $10,000 he could, through Mitchell, perfect title, "and thereupon it was agreed so to do," and that Sage was authorized to "effect that arrangement." Sage swears, in his answer, and Mitchell in his depostion (p. 83, int. 15), that the arrangement never was effected. If he seeks damages for Sage's having failed to effect the arrangement, the action is misconceived. If the complainant would follow the property as trust property, and complain of Sage as an unfaithful agent or trustee, he has put upon record no definite or tangible agreement or declaration of Sage to show such relationship.

The facts, as disclosed, are conclusive against the probability of Mitchell's ever contemplating the relinquishment of his interests for the sum of ten thousand dollars. He was an individual incumbrancer to the amount of three times that sum, and over. He testifies, on page 18, fol. 33, that the sum of $12,000 was expended in the *purchase* of judgments; when at the same time he had judgments, in his own name and right, to the amount of $18,556 04.

See statement of judgments against Sweet, p. 122.

Mitchell was purchasing judgments to protect and fortify

himself against the alleged fraudulent title of Blossom; and he would hardly have relinquished his interests—what he had acquired by purchase, and his own judgments—for the sum of ten thousand dollars.

What it might cost Wheeler & Co to "perfect title," beyond their mortgage debt, was merely speculative. It would seem that they had in their own minds settled upon the sum of $10,000; but, as abundantly appears, such idea became impracticable, and no agreement based upon it was ever consummated.

Wheeler alleges, in his bill (record, p. 3), and, as it were, to give color to his statement that Sage was to contract with Mitchell to "perfect title," for $10,000; that he, Wheeler, had credit upon the books of the firm to more than the amount of his proportion of the $10,000. He makes Slocum also swear to a like statement in regard to himself.

See Slocum's dep., p. 57, record, *cross-examination*.

It is not very material, perhaps, but these declarations are false; if not intentionally so, recklessly asserted.

See dep. of Cary, the book-keeper, p. 123, and the accounts stated between Slocum and Sage, and Wheeler and Sage, pp. 68–69.

By the deposition of Cary, it appears that Sage was always in advance to his copartners, and furnished the capital for the business of the firm; and by the accounts stated it appears that although Slocum's proportion of the mortgage debt, as established, amounted—including interest—to $8,000 20, yet there was a balance due him from Sage, of but $6,910 89; and as to Wheeler, his account (p. 69) shows that he was in Sage's debt to the amount of $2,107 09, after crediting him with his own one-third interest in the decree. So far from their having any "credit," on the books, both were indebted to Sage, at the time of the alleged agreement to "perfect title," for $10,000. They have signally failed in their attempt to build up an equity upon the theory that they were creditors of the firm.

VII. If there did exist between Wheeler and Sage a valid agreement to "perfect title to the mortgaged premises," by

means of the negotiations through Mitchell and Sweet, or otherwise, the project was abandoned before the foreclosure sale.

See Wheeler's letters to Sage, October 9th, 13th, 27th, and November 8th, 1855, pp. 119, 120.
Sage to Wheeler, October 10th, p. 101.
Sage to Fynch and Lynde, p. 101,
Sage to Mitchell, 10th October, p. 102.

In Sage's letter to Wheeler, of the 10th October, he says, speaking of the arrangement for basis of decree, "*the money to be paid on the day of sale* * * * * * This is all we can hope to get by litigation," &c., and goes on to direct an account of the expenses. To this letter Wheeler replies and assents, October 13th. (p. 119.) These letters of themselves show that the idea of "perfecting title" had vanished, and that the chief object had become that of ridding themselves of defences to the foreclosure, and securing a decree.

Mr. Mitchell says (p. 83), when questioned as to any agreement for "perfecting title:" "There was at one time an overture made to me by Mr. Wheeler on that subject. Personally I was then willing to do anything in my power to have it brought about; but it became impracticable to do it, and the whole thing fell through."

See Wheeler's letters to Sage—
October 29th, 1855.
November 8th, 1855.
January 4th, 1856.
" 19th, " and
" 26th, 30th, 1856, pp. 120, 121.

These letters show that the original alleged project of "perfecting title" had been abandoned, and that the establishment of the amount of the mortgage debt had become the prime motive. One chief item charged against Sage in the foreclosure suit was the value of the rent of the warehouse property which Wheeler & Co. had occupied. The controversy and negotiation on that subject lingered until near the period of the decree.

See the letters between Sage and Wheeler.

Sage to Wheeler, May 9th, 1855, p. 96.
Wheeler's letters, 10th and 12th May, p. 116.
Sage to Wheeler, 4th June, 1855, p. 99.
Mitchell to Sage, 6th Oct., 1855, p. 89.

And the correspondence further shows that Sage was striving to increase the amount of the mortgage debt by decreasing the sum to be allowed as rent; and in this he advised against the lease to Button for $4,000 per year, as furnishing evidence of the value of Wheeler & Co.'s occupation, and by his negotiation with Mitchell, saved to the firm over $8,000; and all tending to prove—indeed conclusively showing—that there were no pending negotiations with Mitchell, other than to agree upon and establish the amount of the mortgage debt.

See, in this connection—

Sage's letter to Wheeler, Oct. 4, 1855, p. 100.
Acknowledged by Wheeler, Oct. 8, p. 119.

But what is more potent than all else as showing that Wheeler supposed the scheme of "perfecting title" abandoned, is what appears in other parts of Mitchell's testimony, (see pp. 83, 84,) and in the testimony of Lyndsay Ward, (pp. 78 to 80.) It seems that Wheeler, during the period between the decree and sale, conceived the idea of buying the property on his own account, or on joint account for himself and Ward. That he sought negotiations to that end is positively testified to by both Ward and Mitchell. From this there is but one conclusion to arrive at. Wheeler knew that because of Mitchell's superior incumbrances he would undoubtedly become the purchaser at the sale; hence he sought to bargain with him beforehand; he also knew that Wheeler & Co.'s intentions and schemes were at an end by compact; hence he felt at liberty to treat with Mr. Mitchell; otherwise we must suppose Mr. Wheeler deliberately and faithlessly intending to violate his alleged existing contract with Sage, and failing in which he has resorted to the present remedy to compensate his disappointment.

The value of Ward's and Mitchell's testimony in this regard cannot be over estimated. It establishes the fact conclusively, that Wheeler supposed—the amount of the mortgage debt being

settled—all negotiations and compacts were at an end, and that he was at liberty to become individually a competitor at the sale. That he did attempt to become so, is conclusively proven. If he could thus embark as a purchaser, why not Sage? The fact and law of the case is, that either one of them was at liberty and might with legal and equitable impunity treat and bargain for a title, so far as any personal obligations or relations between themselves were concerned.

VIII. If the complainant has established any theory by his bill and proofs, it is that the firm of Wheeler & Co. aimed at purchasing title to the mortgaged premises—not by paying the value of them, or what they would bring by fair competition at public sale—but by combination tending to repress all rivalry and competition. He alleges that the premises were worth at the time of the execution of the mortgage, at least $50,000; that since the foreclosure sale, portions of them had produced $105,000, and that the balance were worth $27,000. The mortgage debt was—in round numbers and as agreed upon—about $24,000. To this they were to add $10,000, making $32,000 for a property which, at the date of the mortgage, was, as alleged, worth at least $50,000, and $132,000 at the date of the bill. What it might have been worth in 1854, at the time they set out in their scheme to "perfect title," we are uninformed by the record. The value of the property, however, would have no weight in the application of the law to the case. Their contemplated arrangement was directly against the policy of the law, and Courts will give no relief upon contracts tainted with such considerations.

Prior to the time when the alleged contract to "perfect title" was abandoned, the correspondence shows a contemplated scheme with an insolvent debtor to secure title to his real estate at the expense and by sacrifice of other creditors. For the correspondence, which alone reflects the motives of the parties, see

Wheeler's letters, April 29, 1854, p. 107.
" " June 27, " 108.
" " July 1, " "
" " May 17, " "
" " July 4, " "

Wheeler's letters,	April 26,	1854,	110.
" "	Sept. 6,	"	111.
" "	" 11,	"	"
" "	Oct. 7,	"	
" "	Nov. 18,	"	112.
" "	Jan. 9,	1855,	112.
" "	May 5,	"	115.
" "	" 17,	1584,	108.
" "	" 18,	1855,	116.
" "	" 19,	"	117.
" "	" 19,	"	"
" "	Sept. 4,	"	118.
Sage to Wheeler,	Sept. 13,	1854, p.	94.
" "	" 14,	"	"
" "	April 24,	1855,	95.
" "	June 4,	"	99.

Reading the whole correspondence, we have a scheme developed to outvie other creditors and to repress competition. The Court will grant no relief in such a case.

Phippen *vs* Stickney, 3 Met., 384.
Bexwell *vs.* Christie, 1 Cowp., 395.
Howard *vs.* Castle, 6 Term Rep., 642.
1 Story Eq., Sec. 293.
Thompson *vs.* Davis, 13 John., 114.
Veazie *vs.* Williams, 8 How., 134.
Hawley *vs.* Cramer, 4 Cowen, 717.
Fuller *vs.* Abrahams, 3 Brod. & Bing., 116.
Jones *vs.* Caswell, 3 John. Cas., 29.
Doolin *vs.* Ward, 6 John., 194.
Wilbur *vs.* Howe, 8 John., 444.
Randall *vs.* Howard, 2 Black, 585.

These numerous cases are cited, not to prove, but to show the various circumstances to which Courts have applied the rule.

We invite particular attention to the letters before cited, appearing on pages from 105 to 121 of the printed record. If they do not exhibit anything worse, they will at least substantiate the facts upon which we base this point of an illegal combination.

IX. Complainant has never offered to refund the money received from Sage, nor to assume the obligations undertaken by him. If Wheeler would take advantage of Sage's contract with Mitchell, he must take it in whole, and exactly as Sage made it. He should not be permitted to hold us in a lawsuit and to speculate upon the chances of prospective value of what Sage received from Mitchell.

Dunlap's Paley on Agency, 172, 174, and notes.
Wilson *vs.* Poulter, 2 Strange, 859.
Reid *et al. vs.* Hibbard, 6 Wis., 175.
Story on Agency, Sec., 250.
Clark *vs.* Baker, 5 Met., 452.
1 Leading Cas. Eq., 157, note.
Ibid, 167, note.

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